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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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APPENDIX BOOK TWO

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60 pp

APPENDIX K

City of Tampa Personnel Manuel
Procedures and B. DIRECTIVES AND
Standards BENEFITS
Standards 818.1 Salary Administration

818.1A

POLICY

1. Rate of Pay – An employee's rate of pay is determined according to the employee's position classification. Position classifications are assigned specific pay grades within a specific salary schedule.
2. New Hires – A new employee regardless of status is assigned to Step One of the position classification's pay grade unless prior authorization to be paid at a higher step has been obtained from the Director of Administration (or designee).
3. Promotions
   a. A promotion is a change from a position in a lower classification to a position in a higher classification involving an increase in duties and responsibilities and an increase in pay.

b. The pay grade is determined by the class of work to which the employee is promoted. In some cases an employee's promotion may place the employee in a pay grade which is found in a different salary schedule.

c. The pay step is determined as follows:

(1) Promotional Pay Grade is in Same Salary Schedule

The employee is placed in the front step of the new pay grade, or the step which provides a minimum of a one-step increase in pay, whichever is higher. For example: an employee at grade N25 step 5, who is promoted to a grade N29 is placed at step 2; an employee at grade N26 Step 6.5 who is promoted to grade N30 is placed at step 3.5.

(2) Promotional Pay Grade is in Different Salary Schedule

The employee is placed in the first step of the new pay grade within the different salary schedule. However, in the event that this first step rate of pay is less than or equal to the employee's former rate of pay, then the employee is placed in the next higher step of the new pay grade which provides a minimum of a one-step increase in pay. For example: an employee at grade N25 step 5, who is promoted to a grade S10 is placed at

step 2; an employee at grade N26 step 6.5 who is promoted to S12 is placed at step 2.5.

d. A promotion generates a new salary review date six months from the effective date of the promotion and annually thereafter. However, if the probationary period is established for a period other than six months then the new salary review date is equal to that probationary period and annually thereafter.

e. If an employee is eligible for an annual salary review within three months of a promotion, then the employee is placed at the rate of pay which is 1.0 step beyond the rate of pay that the employee would have received but for the promotion.

4. Demotions

a. A demotion is a change from a position in a higher class of work to a lower class of work involving a decrease in duties and responsibilities. A demotion may be voluntary (administrative) or the result of a disciplinary action.

b. An employee who has completed the probationary period and who is demoted, is placed in the pay grade of the class of work to which the employee is demoted.

1) A voluntary demotion shall be to the step of the new pay grade with the same rate of pay as the current position or the highest step of the new pay grade, whichever is lower. For example: an employee who voluntarily demotes from pay grade N29 step 2 to pay grade N25 is placed at step 6 and retains the same rate of pay.

2) A disciplinary demotion shall be to the same step of the lower grade. For example: an employee who is demoted from pay grade N29 step 2 to pay grade N25 is placed at step 2 which results in a decrease in pay.

3) The salary review date is the same.

c. An employee who has not completed the entrance probationary period and who is demoted, is placed in step one of the pay grade of the new class of work regardless of whether the demotion is voluntary or the result of a disciplinary action.

1) The salary review date shall be six months from the date of the demotion.

c. If, during the promotional probationary period, an employee is returned for any reason to any position, then the demotion shall be to the same pay in which the employee held status prior to the promotion. However, in the event that the employee's prior pay rate is higher than the maximum step of the grade, the employee is placed at the maximum step of the new pay grade.

1) The salary review date shall be six months from the date of the demotion except when the employee is demoted to the same position previously held, in which case the salary review date is delayed by the number of days for the cumulative period the employee was in the higher position.

5. Regrading – A regarding is a change in the pay grade assigned to a given class of work. The duties and responsibilities of the position usually remain the same. A pay adjustment is made for all positions within a given classification of work.

a. Class Upgrade – This is a regarding which raises the pay grade of a position classification to a higher grade. An employee in a position which receives an upgrade is paid at the new grade and retains the same step and same salary review date.

b. Class Downgrade – This is a regarding which lowers the pay grade of a position classification to a lesser grade. An employee in a position classification which receives a downgrade is assigned to the new pay grade but at the same rate of pay. The salary review date is the same. If the employee's pay rate is higher than the maximum step of the grade, then the employee is placed at the maximum step of the new pay grade.

6. Reclassifications

a. A reclassification is a change in the employee's position classification caused by a change in the nature of the work required by the position. A position's classification is based on the relative difficulty of duties and responsibilities and the required employment qualifications.

b. A reclassification to a higher level position is based on an increase in duties, responsibilities and employment qualifications and is treated as if it were a promotion for the purpose of pay determination.

c. A reclassification to a lower level position is based on a decrease in the level of duties, responsibilities and employment qualifications, and is treated as if it were a voluntary demotion for the purpose of pay determination.

7. Return From Lay Off

a. Same Class of Work – If the employee returns from lay off to the same class of work or to a class of work with the same pay grade, the employee is placed in the same step occupied at the time of the lay off. The salary review date is adjusted in accordance with 818.1A1e).

b. Higher Class of Work – If the employee returns to a higher class of work, the pay rate is determined in accordance with the salary policy for promotions (see 818.1A3)).

c. Lower Class of Work – If the employee returns to a lower class of work, the pay rate is

determined in accordance with the salary policy on voluntary demotions (see 818.1A4).

8. Lateral Transfers

a. A lateral transfer is a change from one City department to another City department when the employee selected for the vacant position retains the same classification and/or the same pay grade. No change in pay results.

1) The salary review date for an employee who laterally transfers does not change. The current department completes a performance evaluation for the period up to the date of transfer; the new department completes a performance evaluation from the date of transfer to the salary review date. The resulting total evaluation based on the ratio of time and performance rating determines the employee's eligibility for the merit increase.

9. Across the Board Increases – Employees will receive across the board increases at the discretion of the Mayor or as negotiated in applicable collective bargaining agreements.

10. Merit Increases

a. Merit increases may be awarded to a regular City employee upon completion of the entrance or promotional probationary period; and annually thereafter from the last merit increase. The date of the merit increase is considered the Salary Review Date.

b. Merit increases are based on the quality of the employee's job performance, work habits (including attendance), initiative and maturity.

c. The mechanism used to determine an employee's worthiness for a merit increase is the appropriate performance evaluation form based on the employee's job classification. Evaluations may be completed as often as the department determines but must be completed prior to the completion of the entrance or promotional probationary period and then at least annually even if the employee is at the maximum step.

d. An employee who is rated unsatisfactory ('Poor' or 'Below Expectations') will be re-evaluated at least annually. However, at the supervisor's discretion, the employee may be re-evaluated in 60 or 90 days from the salary review date.

1) A merit increase which is denied pending a performance re-evaluation at a future date shall only be effective on the date of satisfactory re-evaluation. Payment shall not be made retroactive to the original salary review date.

a) If a merit increase is granted for a re-evaluation within 90 days of the original salary review date, the department director may make a written request to the Director of Administration to restore the original salary review date for future salary reviews if the department director feels circumstances warrant such considerations.

b) If the merit increase is delayed longer than 90 days, the new salary review date will be determined by the effective date of the re-evaluation.

e. In the event that an employee is on a suspension, leave of absence, lay off, or worker's compensation for a cumulative period in excess of 30 days, the employee's salary review date will be delayed by the number of days over the 30 days. However, if the employee is serving a probationary period the salary review date will be delayed for the complete cumulative period (including the 30 days).

f. Merit increases are awarded as follows:

1) Bargaining Unit Employees – For P.B.A., I.A.F.F., or A.T.U. Bargaining Unit Employees, refer to the current collective bargaining agreement.

2) Non Bargaining Unit Employees

(a) Police Non-Bargaining unit employees (Pay grades P-10 and P-14) receive a one step increase upon the successful completion of the one year promotional probationary period and annually thereafter on the Salary Review Date up to the maximum step of the pay grade.

(b) For Supervisory('S' pay plan) and Professional, Administrative & Technical ('N' pay plan) employees refer to 818.2.

APPENDIX L

City of Tampa Procedures and Standards Standards

Personnel Manuel
B. DIRECTIVES AND BENEFITS
818.1 Salary Administration – Merit Increase Supv. & Prof. Employees

818.1A

POLICY

1. Supervisory ('S' pay grade) and Professional, Administrative & Technical ('N" pay grade) employees are awarded step increases upon the successful completion of the entrance or promotional probationary period and annually thereafter on the Salary Review Date. Increases are based on the overall points scored on the applicable performance evaluation. A maximum rating of 57.5 points is applied to the Supervisory Performance Evaluation. A maximum rating of 65.0 points is applied to the Professional, Administrative & Technical Performance Evaluation.

    a. Professional, Administrative & Technical Employee Performance Incentive Plan:

PERFORMANCE RATING	POINTS AWARDED	STEPS
Poor	Less than 33.0	0
Below Expectations	39.0to 38.9	0
Fully Meets Expectations	39.0 to 51.9	.5
Excellent	52.0 to 60.9	1.0
Outstanding	61.0 to 65.0	1.5

b. Supervisory Employee Performance Incentive Plan:

PERFORMANCE RATING	POINTS AWARDED	STEPS
Poor	Less than 29.0	0
Below Expectations	29.0 to 34.4	0
Fully Meets Expectations	34.5 to 45.9	.5
Excellent	46.0 to 54.9	1.0
Outstanding	55.0 to 57.9	1.5

c. The determination of point ranges for each rating is based on an expected distribution of employees based on appropriate and

substantiated documentation of performance. In the event that ratings for the fiscal year indicate an altered overall distribution not related to valid reasons, point ranges shall be adjusted to ensure that only those employees deserving the higher ratings are awarded the additional steps.

(1) Raters shall follow the procedures and requirements for proper completion of performance evaluations including substantiation and documentation of the selection of ratings. Raters are prohibited from selecting higher point ratings in order to make an employee eligible for additional steps when they are not merited.

(2) The Director of Administration (or designee) shall have the authority to alter the awarding of merit step increases for an employee when the rating is deemed inappropriate.

2. Salary administration for new hires, promotions, demotions, and other transactions are specified in 818.1.

3. This policy is effective September 30, 1990. For purposes of implementation employees receiving .5 PEP are placed at step 8.5, employees receiving 1.0 PEP are placed at step 9.0, and

employees receiving 1.5 PEP are placed at step 9.5.

APPENDIX M

City of Tampa Procedures and Standards Standards	Personnel Manuel B. DIRECTIVES AND BENEFITS 828.2 Discipline Administration Cause for Dismissal

828.2A

POLICY

1. PURPOSE – This policy is provided as definition of the types of conduct and/or performance which may be considered cause for dismissal of City of Tampa employees.

2. Employees may be dismissed from employment for a variety of causes. The examples of misconduct and/or unsatisfactory performance enumerated in this policy for which dismissal is considered appropriate are not all inclusive. A listing of every instance for which dismissal may be appropriate is, of course, an impossibility, The City does not desire that improper conduct not listed herein be considered as proper or condoned due to its omission from this policy. City employees are also subject to disciplinary action as

specified in other City policies, labor agreements or other rules and regulations.

3. The City of Tampa Civil Service Rules and Regulations authorize the City to dismiss employees due to incompetence, insubordination, neglect of duty, moral turpitude, and/or breach of peace (Article

4. J. Section 4.a.). The types of conduct and/or performance which fall into these categories which may be considered cause for dismissal are listed below. As stated above, these lists are not all-inclusive.

a. Incompetence

1. Inability to perform up to accepted work standards.
2. Habitual tardiness, absenteeism and/or abuse of leave privileges.
3. Failure to obtain or to maintain licenses, certifications and/or other professional credentials required for employment.
4. Failure to notify appropriate City officials of the loss of any license, certification or other credential require for employment.

b. Insubordination

1. Repeated violations of City and/or Departmental rules or directives.
2. Disregard for or repeated failure to follow the instruction or direction of a supervisor.
3. Refusal to sign and/or complete documents required for employment.

4. Refusal to have fingerprints or photograph taken for a legitimate City purpose.
5. Disorderly or inappropriate physical or verbal conduct.
6. Refusal to cooperate fully in any internal or other investigation or hearing.
7. Failure to provide timely and acceptable documentation to support a request for leave.
8. Inappropriate use of City identification, including uniforms.
9. Granting permission to a subordinate to violate any rule, policy or regulation, whether explicit or condoned through inaction.

c. Neglect of Duty

1. Causing damage or loss of public or private property and equipment through negligence or willful misconduct.

2. Excessive or repeated waste of supplies and/or materials.

3. An absence without approved leave of three consecutive work days.

4. Failure to return to work after an approved leave of absence.

5. Involvement in excessive accidents or safety violations.

6. Operating a City vehicle without the type of valid license required for operation of the vehicle.

7. Operating a City vehicle or equipment in a wanton disregard for safety.

8. Failure to report any on-the-job accident or injury in a timely manner.

9. Use of City equipment, including vehicles, for any unauthorized purpose.

10. Failure to notify supervisor of any use of prescription or other medication that may impair performance.

11. Unauthorized release of information or records.

12. Unauthorized vending or solicitation on City property.

d. Moral Turpitude

1. Falsification or misrepresentation of any document or record completed in the course of employment or in obtaining employment, including group insurance claims.

2. Violation or City Code or other City policies relating to impartiality, use of public property, conflict of interest, disclosure, and/or confidentiality.

3. Arrest for a felony.

4. Arrest for a misdemeanor involving moral turpitude or any 1st degree misdemeanor.

5. Attempting to coerce or influence a member of the public, fellow employees, subordinates or supervisor with gifts, services, loans or other considerations or accepting same as described in 823 of the City of Tampa Personnel Manual, Conflict of Interest.

6. Violation of any Florida Statute dealing with labor organizations.

7. Violating City ordinance or regulations regarding political activity.

8. Violating City policy or state law regarding nepotism.

9. Engaging in any employment, activity or enterprise which is illegal, incompatible or in technical conflict with the employee's duties and responsibilities as a City employee.

10. Refusal to provide information required through the course of employment.

11. Theft or unauthorized removal or use of City property.

12. Failure to report salary overpayments.

13. Operating a City vehicle or equipment or reporting to work while under the influence of alcohol or controlled substance(s).

14. Possession of alcohol or controlled substance(s) while on duty or on City property.

15. Refusal to submit to substance abuse testing or to follow through with treatment or follow up testing as described in B33 of the City of Tampa Personnel Manual, Employee Assistance Program.

16. Violation of B1.2 of the City of Tampa Personnel Manual, Discriminatory conduct in accordance with the guidelines set forth in B1.2.

e. Breach of Peace

1. Being offensive or antagonistic, either physically or verbally, toward any City employee or member of the public at any time.

2. Threatening, conspiring to commit, attempting or actually committing any assault or battery upon any city employee or member of the public, on City property, during working hours or as a result of City employment.

3. Possession or use of firearms, explosives or other weapon during work hours or at any time on City property or in City vehicles unless authorized by the Mayor.

    a. Department directors shall be responsible for requesting authorization from the Mayor for the appropriate departmental employees. A record, listing the employee name, employee identification number, position number, job title, justification, applicable gun permit, and training, shall be submitted to the Mayor for

review and authorization by June 15, 1994. Said record shall be resubmitted each time an authorized employee changes position or the department director is recommending additions or deletions and provided that each departmental listing shall be updated for review semi-annually and submitted to the Mayor on October 1 and April 1 of each year. The appropriate gun permit shall be required before any authorization occurs.

b. Exception. Persons employed as certified law enforcement officers, the Fire Tactical Medical Response Team, Solid Waste Rangers, and Park Rangers, shall receive authorization from the Police Chief.

4. Disruption of City operations, functions or services

4. REINSTATMENT FOLLOWING ARREST – Any employees who has been dismissed from the City of Tampa because of an arrest by any law enforcement agency may be considered for reinstatement to a position in the City of Tampa, provided that the employee is acquitted after a trial on the merits of the case. The employee shall notify the Director of Administration, in writing, of the request for reinstatement within five (5) working days following the determination of acquittal and

shall include proof of the acquittal. An employee not eligible for reinstatement may be eligible for re-employment following the normal application, certification of eligibility, and selection procedures.

APPENDIX N

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

v. Case No.: 8:00-CV-2179-T-17 MAP
CITY OF TAMPA,

Defendant.
_____/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMMARY JUDGMENT

Plaintiff, DEBORAH A. MAYS, hereby files her Memorandum of Law in Opposition of Defendant's Motion for Summary Judgment.

STATEMENT OF DISPUTED FACTS AND ADDITIONAL UNDISPUTED FACTS

Undisputed: Plaintiff is hearing impaired. Plaintiff's hearing sometimes fluctuates from one day to the next. Plaintiff has worn a hearing aid since approximately 1997 or 1998. Mays, p.10-11. Plaintiff has not had this disability her entire life. Her disability started in 1988 and was caused by spinal meningitis, which left her deaf in the right ear and with hearing only in the left ear. Mays, p.13-14; Composite Exhibit 1 attached hereto.

The Defendant initially provided Plaintiff with a volume-controlled telephone in response to her request for accommodation. After using that telephone on several occasions, Plaintiff told her supervisor, Sheila Bradley, that the phone was not helping her. However, Bradley did not belief Plaintiff. Bradley, p. 35-36. Bradley knew that Plaintiff's request for accommodation had still not been satisfied.

Disputed: The Defendant knew that Plaintiff asked for another accommodation. In the "goals and objectives" Bradley prepared for Plaintiff on February 1, 2000, Bradley's goal was "to obtain a telephone device that will enable Mrs. Mays to perform all the task (sic) of her position." See Exhibit 3 to Bradley's deposition. Plaintiff also asked for another accommodation. She requested that she not be required to answer the telephone. Mays p.27.

Telephone answering was only a marginal function of the position of an OSS II classified employee with this

Defendant. Rotary telephone duties consisted of one employee assigned to rotary and one back-up employee assigned as backup. Those duties were just one of 9 different types of tasks performed by OSS II employees on a daily basis. See Exhibit 6 to Bradley's deposition. None of the employees were required to perform all nine tasks. The Office Support specialist II specific job description only requires that "an employee in this class is responsible for performing and/or participating in **one or more** clerical assignments of average difficulty, which might include receptionist, secretarial, records keeping and administrative activities. See Exhibit 1 to Defendant's motion. Employees were not required to participate in each and every on of these tasks. See Exhibit F to the Defendant's motion. Exhibit F to the Defendant's motion clearly shows that Bradley understood this principle. She states "**if** you are assigned this task," referring to "routing and running," one of the tasks performed by the OSS II employees. On the days that Plaintiff was not doing the telephone, she did more of other types of work.. Mays, p.29. The schedules, daily activity reports and monthly reports show that Plaintiff performed various other tasks than just data entry. Plaintiff was assigned to perform and did perform. Supplements (SS), Routing and Running of Criminal reports (RR), Data Entry (DE), Training (TR), Traffic (T), State Attorneys Lists (SAO), Mail (ML), Coding. See Exhibits 6, 7 and 8 to Bradley's deposition; Mays, p. 52.

Daily Activity Reports were completed by the employees on a daily basis and submitted to the supervisor at the end of the day. Those reports reflect the actual work performed by the employees on a given day. Bradley, p.12.

The schedules, Daily Activity Reports and Monthly reports reflect that Plaintiff performed all the tasks that are contained in the Defendant's job description of Plaintiff's duties and responsibilities that was attached to the Defendant's motion as Exhibit 1. Plaintiff processed criminal reports by routing copies, entering data into the computer, attaching supplemental information and distributing appropriately." Plaintiff compiled and entered data for computer index files. Although Plaintiff did not personally take the telephone requests from law enforcement personnel, Plaintiff responded to those requests. For example, what the Defendant internally referred to as "SAO Lists." Plaintiff processed supplemental data and reports on a daily basis. Plaintiff responded to over the counter requests for record information from SAO, police officers, related agencies and the general public; Plaintiff made copies of a computer generated summary sheet based on traffic and criminal reports that are forwarded to the appropriate division on a daily basis; Plaintiff transferred reports into storage boxes for scheduled microfilming. Plaintiff maintained harmonious working relationships with other employees and the public. Finally, Plaintiff fulfilled all

assignments as received from her supervisory personnel in a competent manner and performed job related tasks that correlate with that purpose and objective of the police department. Bradley admits that Plaintiff has never refused to help or work at the front counter when scheduled. Bradley. P.40.

Plaintiff was not relieved of all her essential functions during her pregnancy. Rather, Plaintiff's duties were increased in comparison to the other OSS II employees' duties. On September 8, 1999, Bradley issued a memo to all the OSS II employees requiring 4 reports from them. At the time Bradley issued this memo, she also meant to apply the 4-report requirements to Plaintiff. Bradley, p.85. However, on September 16, 1999, less than two weeks later, Bradley issued a separate memo to Plaintiff, supposedly because Plaintiff was only performing data entry and microfiche functions. Bradley, p.93; Exhibit F to the Defendant's motion. However, Plaintiff was performing various other functions, just as the rest of the OSS II employees during that period. And the other OSS II employees were not assigned to do data entry. Exhibits 15 and 16 to Bradley's deposition. Bradley, p.78-80, 87-88. The daily reports for that period also reflect that Plaintiff was performing such tasks as traffic, routing and running of supplements, etc. Bradley, p.93; Exhibit F to the Defendant's motion. On September 16, 1999, Bradley issued a memo to Plaintiff requiring her

to enter 8 reports per hour, Exhibit F to the Defendant's motion.

All the other employees were required to only 4 reports. They were using a new system. Everyone was learning the new system and was taking their time to do the reports. Mays, p.42.

Plaintiff was not provided with a Data Entry desk. The other employees had their own desk. Plaintiff started using another employee's desk who worked on the day shift because Plaintiff did not have her own desk. Mays, p.50.

Plaintiff's performance evaluation was not done in accordance with the Defendant's Rater's Manual. See Exhibit #1 to Bradley's deposition. The rater's manual specifically warns that the categories used in the performance evaluation form are common to a large group of related positions, and specifically directs the rater to "apply the dimensions "to the specific job duties of **each** employee." Page 3 of that exhibit. Bradley's supervisor, Vicky Childers, also understood that the dimensions were to be applied to the specific job duties of ach employee within each unit, i.e., to the employees, as they are given certain job duties in the records area. Childers, p. 8. Yet, both Childers and Bradley determined that they should apply the dimensions to the employee's jobs even though that specific job duty was taken away as a special accommodation for a handicap. Childers, p.8; Bradley, p. 30-31. Bradley's "below expectations"

ratings of Plaintiff in the area of communications ability was done contrary to the mandates of the Defendant's performance ratings manual because during eh evaluation period, communications were not part of Plaintiff's specific job functions. In fact, later on, Ken Perry, the Defendant's Labor Relations Manager, ordered that the rating be changed to "fully meets expectations" and to remove the working referring to Plaintiff's hearing condition. Bradley, p. 42. Nevertheless, Perry's intervention did not take place until **after** the evaluation had been given to Plaintiff. Childers, p. 14. Based on the reference on the voided evaluation, it also appears that Perry ordered the changes because Plaintiff had filed her EEOC charge of discrimination. See Exhibit 2 to Bradley's deposition. After Bradley made the changes to the evaluation, she did nothing to let Plaintiff know that the evaluation had been changed. Bradley, p.50.

Plaintiff was still on leave of absence when her performance evaluation was conducted. Neither Bradley nor Childers have ever conducted performance evaluations of any other employee while that employee was still officially on leave of absence. Bradley, p.60. Bradley believes she is allowed to conduct an employee's performance evaluation while the employee is on leave, but Bradley has no basis for this belief. Bradley, p. 76. The Defendant has no written policies authorizing an employee's performance evaluation during the employee's medical leave. No management official of

the Defendant had ever communicated to Bradley that she could conduct a performance evaluation during an employee's medical leave. Bradley, p.77. There was no urgency in having Plaintiff's evaluation during her leave period. Even if Plaintiff were not present for her evaluation, it would not have affected any merit increases to which she would be entitled. Bradley, p. 76-77.

Plaintiff did not agree to have that performance evaluation done during her leave of absence. While it is true that she had planned to physically be at the Defendant's location to take care of some paperwork associated with her leave of absence, she was merely told Bradley wanted to see her to do her performance evaluation. Bradley admits that when she asked Plaintiff if it was okay to discuss her evaluation with her, it was not in the context of Plaintiff being on medical leave. Bradley, p.74.

According to the Defendant's Procedures and Standards, an employee's inability to perform up to accepted work standards constitutes grounds for dismissal and can affect eh employee's merit increase eligibility, as well as eligibility for future promotional opportunities. See Exhibits 2 and 3 attached hereto, a copy of the Defendant's Procedures and Standards B18.1 and B-28.2.

Plaintiff filed two different charges of discrimination with the EEOC. The first one was filed on April 10, 2000 (See Exhibit 1 to Defendant's Motion for Summary Judgment). Plaintiff raised the allegations of pregnancy

discrimination during the first charge. However, through administrative error, the EEOC failed to appropriately annotate the allegations on the face of the charge. See Exhibit A to Plaintiff's Motion to Reconsider Court's Order Dated June 22, 2001, and Plaintiff's Renewed Motion for Leave to File Amended Complaint.

The City failed to provide Plaintiff with accommodations that it provided to other employees when they were pregnant. Mays, p.46. Kelly Bercaw worked the day shift. She was treated differently than Plaintiff when she was pregnant. She was not answering the phone or doing routing and running or the counter duties. Mays, p.46. Bercaw worked the day shift. However, there were no differences between the duties and responsibilities of the day shift employees and the employees supervised by Sheila Bradley. Bradley, p. 15-16. Even though Plaintiff provided doctor's documentation, she was still given many tasks that required her to stoop, bend and stand for extended periods of time. Mays, p.55.

Plaintiff did not admit that the harassment stopped in 1998. Plaintiff only admitted that in 1998 the ridicule had stopped after Major Newcomb posted a memo to all employees. However, the other acts of harassment continued. Such acts include the performance evaluation conducted during her medical leave, rating her below expectation in the area of communications ability, specifically mentioning as a basis for the low rating her

hearing impairment, her main disability under the ADA. Moreover, harassment also constituted of acts such as assigning her more reports than the other employees in her section, especially since all the OSS II employees were just learning a new system and they were still getting errors and all the employees were having problems with the new system. Mays, p.41. The City claims Plaintiff was only doing those reports. However, Plaintiff maintains that she was performing several other functions besides these reports. Therefore, her workload was significantly increased in comparison to that of the rest of the OSS II classified employees.

Bradley also assigned Plaintiff to pull several files even after Plaintiff presented her with a doctor's note requiring her to stay off her fee and not to do any bending or stooping during the day. Mays, p.55-56.

Bradley further harassed Plaintiff by commenting on her performance evaluation that Plaintiff was not willing to work overtime. The category in which that comment was placed was about Plaintiff's "attitude" toward her job. Mays, p.33. Overtime was not a mandatory function of the Plaintiff's job at the time of this evaluation. Bradley, p.47. Bradley also criticized Plaintiff for not working holidays. Yet, Bradley admits that she has never scheduled Plaintiff to work holidays and Plaintiff has never refused to work holidays. Bradley, p. 47.

When other employees were ridiculing Plaintiff, Major Newcomb posted a letter on the bulletin board in

which he told everyone about Plaintiff's condition, in violation of Plaintiff's privacy rights. Mays, p.40.

In Plaintiff's performance evaluation, Bradley also rated Plaintiff below expectations for not working the front counter when she knew that her own supervisor, Vicky Childers, had instructed her to keep Plaintiff away from the front counter, as Plaintiff might misinterpret what is being said or heard, due to her hearing condition. Bradley, p. 39-40. At the same time, Bradley admits she has not scheduled Plaintiff to work the front counter and Plaintiff has never refused to help or to work at the front counter. Bradley, p.40.

Plaintiff's pregnancy per se did not affect her ability to do her job. Mays, p.35. However, Plaintiff was diagnosed with placenta previa and low abdominal complications. Mays, p.35. Not only could that condition negatively affect the health of her unborn child, but also, it limited Plaintiff's ability to bend and stoop and caused pain to Plaintiff if she had prolonged periods of standing. Mays, p. 35-36, 54. Furthermore, Plaintiff's pregnancy-related condition required medical attention.

LEGAL ARGUMENT

Plaintiff's Claims Under the ADA and FCRA Are not Limited by the Scope of Her Charge of Discrimination.

In August 2001, Plaintiff filed a motion for reconsideration of the Court's order denying Plaintiff leave to amend her complaint. Plaintiff hereby

incorporates herein the arguments raised in that motion. In that motion, Plaintiff explained that Plaintiff has raised the issue of pregnancy discrimination well before October 23, 2000, when Plaintiff initially filed her original Charge of Discrimination with the EEOC. When Plaintiff first met with the EEOC official in April, Plaintiff discussed fully with the EEOC officer the facts related to her claim of pregnancy discrimination. Plaintiff had also provided the EEOC with letters from her previous attorney Mr. Dandar, covering the issues of pregnancy discrimination. Attached to Plaintiff's Motion for Reconsideration as Exhibit A is a letter from the EEOC acknowledging that Plaintiff had initially raised these issues with the EEOC, but through the EEOC's fault, the EEOC had failed to address them in their initial investigation of Plaintiff's complaint. Plaintiff appealed and as a result of Plaintiff's appeal, the EEOC issued a letter dated December 14, 2000, acknowledging their mistake, and subsequently reopened Plaintiff's file to continue their investigation of those issues. Accordingly, the two charges should have been one (the one flied in April). Based on these facts, Mays need not seek to have to Court determine that these charges "grow out" of those about which she filed her first charge of discrimination. Plaintiff's claims are those which were stated and which should have been investigated by the EEOC at the same time as her first charges. Therefore, these charges in her judicial complaint have satisfied the prerequisite of the statute.

Plaintiff Can Establish a Prima Facie Case of Disability Discrimination under the ADA and the FCRA.

The facts in this case show a clear disability. An ADA plaintiff must show that the impairment substantially limits a major life activity. *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 911 (11th Cir. 1996). In this case, one of Plaintiff's impairment is her hearing. Hearing is a major life activity. Plaintiff's medical documentation provided to the Defendant clearly shows that her hearing is significantly limited compared with the average person in the general population.

Plaintiff's other disability was the medical condition diagnosed by her doctor while she was pregnant. Although Plaintiff's pregnancy, per se, is not considered a disability, the side effects from the pregnancy, such as inability to stand for long periods of time, without physical implications, do qualify as a disability. In addition to the possible consequences for the health of her baby, Plaintiff suffered personal consequences from standing too long on her feet and from stooping and bending throughout the day while she was pregnant. In *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 911 (11th Cir. 1996), cited by the Defendant, the Eleventh Circuit held that side effects of an employee's chemotherapy treatments qualified as "physical impairment" under the ADA. Although the Eleventh

Circuit ruled against the employee in that case, it did so only because it did not find that this impairment substantially limited the employee's ability to care for himself or to work. *Gordon,* at 912.

Plaintiff's facts are distinguishable from those in *Gordon* in that the side effects of her pregnancy did substantially limit her ability to perform certain tasks. Courts may rely upon the EEOC regulations to define whether or not an impairment affects a "major life activity" or "substantially limits" those activities. *Gordon*, at 911. Major life activities has been interpreted to include walking and working.

> Courts may also consider three additional factors when an individual claims a substantial limitation in the major life activity of work. These factors include: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment, and (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within that geographical region, from which

the individual is also disqualified because of the impairment.

Gordon, at 911-912, citing 29 C.F.R. section 1630.2(j)(3)(ii). The court found that those factors lacking in *Gordon*. Gordon's oncologist specifically stated that he was not disabled by the cancer and that he could continue to work. Gordon also tolerated the side effects of the chemotherapy very well, according to his doctor's observations. *Gordon*, at 913. In this case, Plaintiff's doctors specifically restricted her from being on her feet and from stooping and bending during the day.

The Defendant argues that Plaintiff's pregnancy-related condition is not a disability under the ADA. The Defendant cites *Martinez v. N.B.C., Inc.* 49 F.Supp. 2d 305, 308-309 (S.D.N.Y. 1999) for that proposition. A review of that case, however, indicates that the holding was more narrow. The *Martinez* court, in referring to the EEOC regulations, specifically found that the ADA excludes conditions, "such a pregnancy, that are **not** the result of physiological disorder." *Martinez*, at 3-8. Under that ruling, it is well established that pregnancy, in and of itself, does not constitute a disability under the ADA. However, a physiological disorder, such as placenta previa, is not just a mere pregnancy-related condition. The *Martinez* court did state that under unusual conditions, they would constitute a disability under the ADA. The EEOC regulations seem to include within the

definition of disability a physiological disorder. In Plaintiff's case, placenta previa is a physiological disorder and should be considered as a disability under the ADA. In *Martinez*, the plaintiff had sued because MSNBC had allegedly failed to provide her with a safe, secure, sanitary and private area to breast pump. The court in *Martinez* notes that "it is preposterous to contend a woman's body is functioning abnormally because she is lactating." *Martinez*, at 309. In this case, the facts are distinguishable. It is a fact that placenta previa is an indication of an abnormal functioning of a woman's body. Were Plaintiff's body functioning normally, she would have not been diagnosed with placenta previa. Plaintiff was not just pregnant. She had a medical condition known as placenta previa. Therefore, the logic applied to lactation does not apply to Plaintiff's condition while she was pregnant.

The cases that have not included pregnancy within the definition of a disability have all dealt with **normal** pregnancies. Those cases have held that normal pregnancies do not impair any major life activity. See *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F.Supp. 1087, 1093 (E.D.N.Y. 1996), cited within the *Martinez* case. See also *La Coparra v. Pergarment Home Centers, Inc*, 982 F.Supp. 213, 227 (S.D.N.Y. 1997). Those cases have recognized pregnancy-related complications as a disability under the ADA provided the pregnancy is "unusual or abnormal" and complications

must be "outside the normal range." Those courts also required that the pregnancy-related condition require medical attention. These courts made specific distinctions with cases where the claimed conditions were spotting, leaking, cramping, dizziness, nausea, morning sickness, et. *La Coparra*, at 227 citing various other cases with those conditions. It is obvious that placenta previa is a far more serious and medically based condition, outside the "normal range" of a regular pregnancy and with far greater impact on the unborn child and on the expectant mother. Therefore, based on the rationale of these cases, Plaintiff's conditions falls within the disability definition of the ADA.

Moreover, the Defendant cites to *La Coparra v. Pergament Home Centers, Inc.*, 982 F.Supp. 213 (S.D.N.Y. 1997) for the blanket proposition that pregnancy-related conditions are not disabilities under the ADA. A careful reading of that case also indicates that the holding was not that broad. The *La Coparra* court specifically considered and interpreted the same EEOC regulation that was interpreted in the *Martinez* case and specifically stated:

> That is not to say, however, that physiological complications arising from pregnancy, as distinguished from the condition of pregnancy itself, can never render a woman "disabled" under the ADA. In such situations, the question is whether the complication itself (i.e., the "impairment," or

> physiological disorder) is substantial enough to qualify as a "disability," regardless of the fact that the woman is pregnant.

La Coparra, at 227.

Plaintiff can show that she was qualified to perform the essential functions of her job and did perform these functions with or without reasonable accommodation. Out of more than 9 specific tasks, the function of answering the telephone was just one. Therefore, that function was only a marginal function of the position of an OSS II classified employee with this Defendant. Moreover, the job description did not require that each employee engage in all 9 functions at all times.

Finally, the facts show that Plaintiff did suffer adverse employment action because of her disability. The performance evaluation was not corrected until **after** Plaintiff had filed her EEOC charge of discrimination. Plaintiff was never told about this change in the rating. Even though this performance evaluation was not the basis for which adverse employment action was taken against Plaintiff, negative performance evaluations over a period of time, can constitute grounds for further discipline, such as dismissal, and can affect an employee's merit increase eligibility, as well as eligibility for future promotional opportunities.

Defendant cites to *Davis v. Town of Lake Park, Florida*,245 F.3d 1232 (11th cir. 2001) for the proposition

that a performance evaluation does not constitute adverse action. The holding in *Davis* was fact specific. The facts in *Davis* are distinguishable from the facts in this case. In *Davis* are distinguishable from the facts in this case. In *Davis*, there was a memo in which the employee was criticized for his performance. However, a memo is not the same thing as an actual annual performance evaluation. The *Davis* court emphasized that a memo was not a formal reprimand. A memo is more likened to some of the documentation which may or may not later form the basis for an evaluation. An evaluation has specific ratings that can affect not only future discipline, but also eligibility for certain benefits and promotional opportunities. *See Davis*, at 1241. In fact, the court's rationale in *Davis*, was based on the fact that the employee received a performance evaluation a week following that memo and he suffered no repercussions from that memo. His performance evaluation even resulted in a pay raise. Such is not the case here.

Furthermore, the *Davis* court held that the test for adverse employment action is "whether a reasonable person in [the employee's] position would have found [the alleged alteration of the terms and conditions of employment] to be adverse." *Davis*, at 1240. This is a factual determination that is improperly decided in a motion for summary judgment. A "reasonable" jury could well find in favor of Plaintiff under the circumstances in this case.

Plaintiff suffered adverse employment action in that she was so harassed that she felt compelled to resign her position. She did not feel that she could subject herself to further harassment, especially after the performance evaluation was conducted while she was still on leave of absence. Prior to resigning, Plaintiff attempted to obtain another position within the City. However, she never received an interview. Mays, p.51.

Since Plaintiff has satisfied her initial burden, the burden now shifts to the defendant to articulate a legitimate, non-discrimatory reason for its actions. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The City has not articulated a legitimate, non-discriminatory reason for its actions. Although Bradley claims that telephone duties are part of the essential functions of the Plaintiff's position, Perry had her change the rating after Plaintiff instituted this lawsuit. A jury could infer from this that the Defendant knew Bradley had not followed its performance ratings manual and had intended to discriminate against Plaintiff on the basis of her disability.

"Essential function," as defined by the EEOC regulations, "does not include the marginal functions of the position." 29 C.F.R. section 1630.2(n)(1). In this case, the facts show that telephone answering was only a marginal function of the position of an OSS II classified employee with this Defendant. Exhibit 1 to Defendant's motion clearly supports Plaintiff contention that the rotary telephone duties were a mere marginal portion of her

essential functions. The job requirement does not state that each employee must perform **all** of those functions. Even though requests come by telephone, once these requests are received, the processing of these requests involves more substantial performance than the mere receiving of these requests on the rotary telephone. After the volume-controlled telephone failed to assist Plaintiff, she asked for another accommodation. She requested to be taken of the telephone.

Richardson v. New York State Department of Correctional Services, 180 F.3d 442, 443 (2d Civ. 1999), cited by the Defendant in its motion, more appropriately supports Plaintiff's position rather than that of the Defendant in this case. According to the Defendant's employee manual, negative performance evaluations can constitute grounds for discipline, such as dismissal, and eligibility for merit increases. Therefore, they are used as a basis for action against an employee and constitute adverse job action. In this case, Plaintiff did not suffer any loss of pay. However, Plaintiff did suffer a loss of employment because she was forced to resign her position. This performance evaluation conducted while she was still on medical leave, constituted a material change in the terms, conditions and privileges of Plaintiff's employment. No other employees were treated in this manner. Bradley had never before conducted a performance evaluation of any other employee while that

employee was on medical leave. The Defendant's manual did not provide for that.

Plaintiff Can Establish a Prima Facie Case of Disability Harassment.

Plaintiff can establish that she belongs to a protected group. She was disabled under the ADA. Secondly, the untimely performance evaluation was done at a time not prescribed, and was calculated to inflict distress on Plaintiff while she was on medical leave. This constitutes unwelcome harassment. The "below expectations" rating on the specific item for which the City had granted her accommodation was harassment based on her disability. Bradley specifically rated Plaintiff on the fact that Plaintiff had a hearing impairment, on her specific disability. Bradley knew or should have known about the harassment. Perry should have known about the harassment and should have taken remedial action before Plaintiff brought her lawsuit and did not do so. Therefore, Bradley created an offensive and hostile work environment for Plaintiff by rating her below expectations in the area of communications ability.

Other acts of harassment were the failure to provide her reasonable accommodations that the City had provided to other employees when they were pregnant. Bradley retaliated against Plaintiff because she requested reasonable accommodation by assigning her more work

than the other OSS II employees. Even though Plaintiff provided doctor's documentation, she was still given many tasks that required her to stoop, bend and stand for extended periods of time. Bradley's unfounded criticism of Plaintiff for not working overtime, when that is not a requirement, for not working the front counter when Bradley did not even schedule Plaintiff to work the counter.

A jury may find that those acts are sufficiently pervasive to lead a reasonable employee to resign and not face any more harassment, especially when that employee was already suffering from depression caused by her first impairment, her hearing loss.

CONCLUSION

Base on the above, the Court should deny the Defendant's motion for summary judgment in its entirety.

Respectfully submitted,

Yveline F. Paul, Esquire
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P.O. Box 13167
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Tel: (813) 287-1313
Fax: (813) 287-5519
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing was furnished by First Class United States Mail to Deborah Crumbley, Esquire, and Thomas M. Gonzalez, Esquire, Thompson, Sizemore & Gonzalez, P.A., at 109 N. Brush Street, Suite 200, Tampa, FL 33601, on this 28th day of December, 2001.

_____

Yveline F. Paul

APPENDIX O

42 U.S.C. Section 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes -

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration-

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-

related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. Section 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the

Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

PROOF OF SERVICE

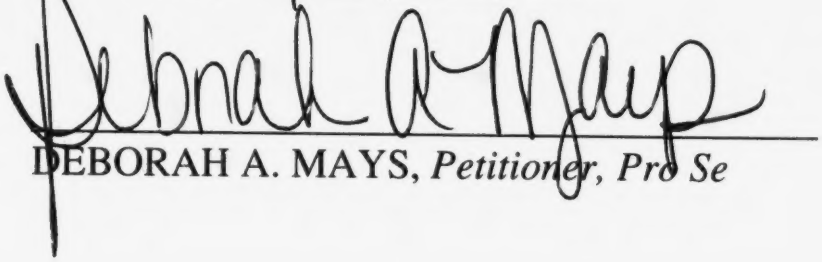
I, DEBORAH A. MAYS, do swear or declare that on this date, 10/24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Appendix Book Four on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire

Jason L. Odom, Esquire
Thompson, Sizemore & Gonzalez, P.A.
501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

CERTIFICATE OF SERVICE

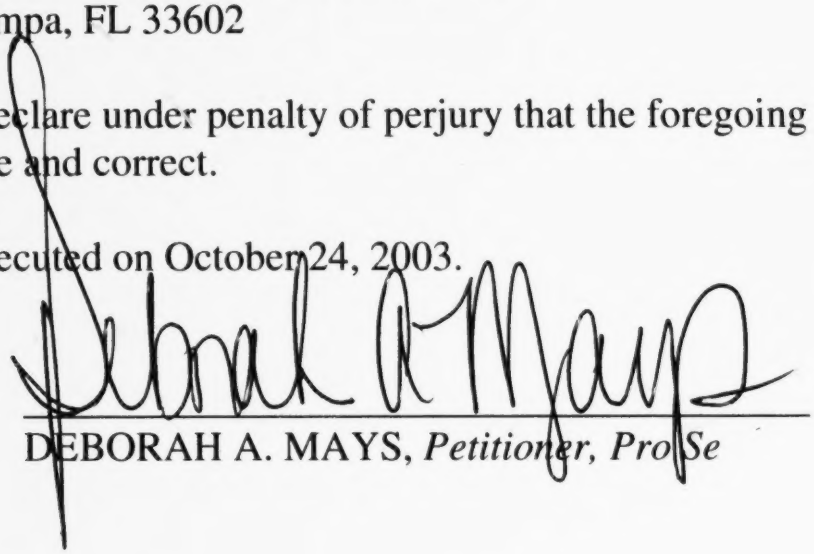
I, DEBORAH A. MAYS, do swear or declare that on this date, October 24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Appendix Book Two on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire
Jason L. Odom, Esquire
Thompson, Sizemore & Gonzalez, P.A.

501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*